Mohd Sobri bin Che Hassan v Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(A)-1784–10 OF 2015
HAMID SULTAN, PRASAD ABRAHAM AND ASMABI MOHAMAD JJCA
12 OCTOBER 2017

Adminstrative Law — Judicial review — Application for — Application to challenge dismissal from services of Municipal Council — Failure of Disciplinary Committee to appoint committee of investigation to investigate charge — Whether decision-making process tainted with procedural impropriety — Disciplinary Committee proceeded to impose punishment of dismissal without giving opportunity to contradict prejudicial report — Whether there was infringement of rule of natural justice — Whether applicant enjoyed protection under s 16(4) of the Local Government Act 1976 — Issues raised in pleadings substantively public law issues — Whether ought to be determined by judicial review — Whether appellate intervention warranted — Federal Constitution art 135(2)

The applicant, an engineer attached to the office of the Majlis Perbandaran Seberang Perai ('the second respondent'), filed a judicial review application to challenge his dismissal from the services of the second respondent. The first respondent was the disciplinary authority of the second respondent, appointed pursuant to reg 26 of the Public Officers (Conduct and Discipline) Municipal Council of Province Wellesley Regulations 1995 ('the MPSP Disciplinary Regulations'). The applicant was transferred from the Engineering Department of the second respondent to its Health Services Department. The applicant filed a civil suit to challenge the transfer. However, the same was dismissed by the High Court on procedural grounds. Aggrieved by the said decision, the applicant appealed to the Court of Appeal and the appeal too was dismissed. The applicant then filed a judicial review application to challenge his transfer. The Chairman of the first respondent informed the applicant of the first respondent's intention to take disciplinary action against the applicant with a view to dismissal or reduction in rank. The applicant was charged under reg 4(2)(h) of the MPSP Disciplinary Regulations for bringing the issue of his transfer to Dato Azhar Ibrahim, the Penang State Assemblyman as all attempts to bring any form of influence or external pressure to support or pursue the applicant's claim against the second respondent's decision to transfer the applicant at the meeting of the Penang State Assembly was a serious breach of the MPSP Disciplinary Regulations. The applicant responded to the said letter vide a written representation denying the charge against him and requesting for

A a committee of investigation to be appointed by the first respondent to investigate the charge against him. The first respondent informed the applicant that pursuant to a meeting, the applicant was found guilty and punished with dismissal. Aggrieved, the applicant filed this judicial review application to challenge his dismissal from the second respondent. In the High Court, the B judicial commissioner ('JC') dismissed the applicant's judicial review application and held, inter alia, that: (a) the applicant did not fall within the category of officers defined under art 132 of the Federal Constitution and hence was not entitled to the protection under art 135(2) of the Federal C Constitution; (b) the applicant was employed based on a contract of service and in terms of discipline, he was subject to the terms and conditions of his employment and the MPSP Disciplinary Regulations; (c) it was the management's prerogative to transfer the applicant from one department to another department and the court would normally not interfere with such D prerogative; (d) the right to be heard does not necessarily mean a right to an oral hearing; and (e) it was for the first respondent to decide if the applicant's case required further clarification, as such, the court could not interfere with the decision of the first respondent not to appoint a committee of investigation. Hence, the applicant appealed against the said decision.

E

Held, allowing the appeal with costs:

(1) It is sufficient for the officer facing disciplinary proceeding to be given the opportunity to make written representations to the disciplinary authority F to answer to the charge proffered against him. That would suffice to satisfy the test that he had been accorded a reasonable opportunity of being heard envisaged by art 135(2) of the Federal Constitution. Fair hearing does not mean the officer facing disciplinary proceedings must be heard orally either in person or by his advocate. The first respondent had G assiduously complied with the procedures outlined under Part IV of the MPSP Disciplinary Regulations. The first respondent had given the applicant a reasonable opportunity of being heard by according the applicant the right to make a written representation. As such, the applicant could not complain that he had been denied the right to be H heard as entrenched under s 16(4) of the Local Government Act 1976 ('the LGA') (see paras 34–35).

(2) The appointment of the committee of investigation is at the discretion of the disciplinary authority and the officer could not demand for the same to be appointed. The court ought not to interfere with the discretion of I the disciplinary authority. It was for the first respondent to decide whether a committee of investigation ought to be appointed to investigate the charge and the applicant could not demand for the same. The point taken up by the applicant that he was denied the right to be heard as the first respondent had failed to constitute a committee of

investigation to inquire into the charge against him had no merit and ought to be rejected by this court (see paras 37 & 40–41). A

(3) The working paper containing material which was detrimental to the applicant was given to the first respondent one day before the decision to dismiss the applicant was deliberated on, without giving the opportunity to the applicant to explain or controvert the same. The first respondent had proceeded to impose the punishment of dismissal on the applicant without giving the applicant the opportunity to explain and/or contradict the detrimental portion of the report. The applicant's previous misconduct was within the knowledge of the first respondent and the first respondent did not provide such information to the applicant. Neither was the applicant informed that such information may be used against him in meting out the punishment. The process undertaken by the first respondent had infringed the rule of natural justice and/or was tainted with procedural impropriety. Hence, the JC had failed to properly evaluate the evidence before him and/or appreciate the relevant laws applicable to the factual matrix of this case in making his ruling against the applicant on this point (see paras 43–44 & 52–53). B C D

(4) There is a specific provision in the LGA which provides the guarantee of a reasonable opportunity of being heard to be accorded to the applicant facing disciplinary proceedings with a view to reduction in rank and/or dismissal. The guarantee is further entrenched by way of a legislation in the form of MPSP Disciplinary Regulations which provide the procedures to be complied with in the event the first respondent proposes to take disciplinary action against the applicant with a view to dismissal or reduction in rank. By codifying the provision for a reasonable opportunity to be given to the applicant for cases involving reduction in rank and/or dismissal, something equivalent to art 135(2) of the Federal Constitution and legislating of the MPSP Disciplinary Regulations, the respondent had brought themselves into the realm of public domain. Thus, the first respondent was not entitled to rely only on the terms and conditions of contract of service, ignoring the clear statutory requirements and protection entrenched in the LGA and the MPSP Disciplinary Regulations. The relationship herein had changed from a pure master and servant relationship to a relationship which attracted public law remedy. The applicant thus enjoyed certain protection by the law through s 16(4) of the LGA and the MPSP Disciplinary Regulations (see paras 61–64). E F G H

(5) The applicant was seeking to nullify his dismissal by the first respondent. In dismissing the applicant, the first respondent had acted under the MPSP Disciplinary Regulations, a Federal law. The grounds raised by the applicant are public law issues, namely a breach of natural justice, failure to comply with s 16(4) of the LGA and failure to comply with the I

requirements of the MPSP Disciplinary Regulations. Issues pertaining to disciplinary matters must be determined by judicial review as 'it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role' (see para 67).

(6) From the outset, the decision-making process was tainted with the elements stated by the applicant, namely illegality, irrationality and procedural impropriety. The JC failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny, merit appellate intervention (see paras 71 & 73).

[Bahasa Malaysia summary

Pemohon, seorang jurutera di pejabat Majlis Perbandaran Seberang Perai ('responden kedua') memfailkan permohonan semakan kehakiman untuk membantah pemecatannya daripada perkhidmatan responden kedua. Responden pertama adalah pihak berkuasa tatatertib responden kedua yang dilantik di bawah peraturan 26 Peraturan-Peraturan Pegawai Awam Majlis Perbandaran Seberang Perai (Kelakuan dan Tatatertib) 1995 ('Peraturan-Peraturan MPSP'). Pemohon dipindahkan daripada Jabatan Kejuruteraan responden kedua ke Jabatan Perkhidmatan Kesihatan. Pemohon memfailkan guaman sivil membantah pemindahannya. Permohonannya ditolak oleh Mahkamah Tinggi atas dasar-dasar tatacara. Terkilan dengan keputusan tersebut, pemohon merayu ke Mahkamah Rayuan dan rayuan ini ditolak. Pemohon kemudiannya memfailkan permohonan semakan kehakiman membantah pemindahannya. Pengerusi responden pertama memaklumkan pemohon niat responden pertama untuk mengambil tindakan disiplin terhadap pemohon dengan tujuan pemecatan atau penurunan pangkat. Pemohon dituduh di bawah peraturan 4(2)(h) Peraturan-Peraturan MPSP atas pembawaan isu pemindahannya kepada Dato Azhar Ibrahim, Wakil Rakyat Negeri Pulau Pinang kerana segala cubaan untuk membawa apa-apa bentuk pengaruh atau tekanan luaran bagi menyokong atau meneruskan tuntutan pemohon terhadap keputusan pemindahan pemohon yang dibuat responden kedua di mesyuarat Majlis Perhimpunan Negeri Pulau Pinang adalah satu pelanggaran serius Peraturan-Peraturan MPSP. Pemohon menjawab surat tersebut melalui pewakilan bertulis menafikan pertuduhan terhadapnya dan meminta sebuah jawatankuasa penyiasatan ditubuhkan oleh responden pertama untuk menjalankan siasatan atas pertuduhan terhadapnya. Responden pertama memaklumkan pemohon, selaras dengan satu mesyuarat, bahawa pemohon didapati bersalah dan dijatuhkan hukuman pemecatan. Terkilan, pemohon memfailkan permohonan semakan kehakiman ini untuk membantah pemecatannya daripada responden kedua. Di Mahkamah Tinggi, pesuruhjaya kehakiman ('PK') menolak permohonan semakan kehakiman pemohon dan memutuskan, antara lain, bahawa: (a) pemohon tidak

terangkum dalam kategori pegawai-pegawai yang ditafsirkan di bawah perkara 132 Perlembagaan Persekutuan dan dengan itu tidak berhak dilindungi di bawah perkara 135(2) Perlembagaan Persekutuan; (b) pemohon bekerja berdasarkan kontrak perkhidmatan dan dari segi syarat disiplin dia tertakluk pada terma dan syarat pekerjaannya dan Peraturan-Peraturan MPSP; (c) adalah prerogatif pengurusan untuk memindahkan pemohon dari satu jabatan ke satu jabatan lain dan mahkamah biasanya tidak akan campur tangan dengan prerogatif tersebut; (d) hak untuk didengar tidak bermakna hak untuk didengar secara lisan; dan (e) adalah untuk responden pertama memutuskan jika kes pemohon memerlukan keterangan lanjut dan mahkamah tidak akan campur tangan dengan keputusan responden pertama untuk tidak melantik jawatankuasa penyiasatan. Oleh itu, pemohon merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Memadai buat pegawai yang berhadapan dengan prosiding tatatertib diberikan peluang membuat pewakilan bertulis kepada pihak berkuasa tatatertib bagi menjawab pertuduhan terhadapnya. Ini cukup untuk memenuhi ujian bahawa dia telah diberi peluang munasabah didengar yang dibayangkan oleh perkara 135(2) Perlembagaan Persekutuan. Pendengaran adil tidak bermaksud pegawai berhadapan dengan prosiding disiplin harus didengar secara lisan sama ada secara peribadi atau oleh peguam bela. Responden pertama telah secara tegasnya mematuhi prosedur yang digariskan bawah Bahagian IV Peraturan-Peraturan MPSP. Responden pertama telah memberi pemohon peluang munasabah untuk didengar dengan memberi pemohon hak pewakilan bertulis. Oleh itu, pemohon tidak boleh membuat aduan bahawa dia telah dinafikan hak didengar seperti yang diperuntukkan oleh s 16(4) Akta Kerajaan Tempatan 1976 ('AKT') (lihat perenggan 34–35).

(2) Adalah mantap bahawa pelantikan jawatankuasa penyiasatan mengikut budi bicara pihak berkuasa disiplin dan pegawai tidak boleh menuntutnya. Mahkamah tidak boleh campur tangan budi bicara pihak berkuasa disiplin. Responden pertama perlu memutuskan sama ada satu jawatankuasa penyiasatan boleh dilantik untuk menjalankan siasatan atas pertuduhan dan pemohon tidak boleh menuntutnya. Hujahan perayu bahawa dia telah dinafikan hak didengar kerana responden pertama gagal menubuhkan satu jawatankuasa penyiasatan untuk menyoal siasat pertuduhan terhadapnya tidak bermerit dan harus ditolak (lihat perenggan 37 & 40–41).

(3) Kertas kerja mengandungi material memudaratkan pemohon telah diberi kepada responden pertama sehari sebelum keputusan untuk memecat pemohon dibincangkan, tanpa memberi peluang kepada

pemohon untuk menjelaskan atau mempertikaikannya. Responden pertama telah mengenakan hukuman pemecatan atas pemohon tanpa memberi pemohon peluang untuk menjelaskan dan/atau menyangkal laporan yang memudaratkan itu. Salah laku pemohon sebelum ini diketahui responden pertama dan responden pertama tidak memberi maklumat itu kepada pemohon. Pemohon juga tidak dimaklumkan bahawa maklumat itu boleh diguna pakai terhadapnya apabila menjatuhkan hukuman. Proses yang dilakukan oleh responden pertama melanggar peraturan keadilan semula jadi dan/atau tercemar dengan kesalahan prosedur. Oleh itu, PK gagal menilai keterangan yang dikemukakan dengan betul dan/atau mempertimbangkan undang-undang relevan yang terpakai pada fakta kes ini dalam membuat keputusannya terhadap pemohon atas hujahan ini (lihat perenggan 43–44 & 52–53).

(4) Terdapat peruntukan spesifik dalam AKT yang memperuntukkan jaminan peluang munasabah didengar diberikan kepada pemohon yang berhadapan dengan prosiding disiplin dengan tujuan menurunkan pangkat dan/atau pemecatan. Jaminan lebih ditekankan melalui perundangan dalam bentuk Peraturan-Peraturan Disiplin MPSP yang menyediakan prosedur-prosedur dipatuhi sekiranya responden pertama bercadang untuk mengambil tindakan disiplin terhadap pemohon dengan tujuan pemecatan atau penurunan pangkat. Dengan mengkodifikasikan peruntukan untuk peluang munasabah diberi kepada pemohon untuk kes-kes yang melibatkan penurunan pangkat dan/atau pemecatan, sesuatu yang bersamaan dengan perkara 135(2) Perlembagaan Persekutuan dan undang-undang Peraturan-Peraturan Disiplin MPSP, responden-responden telah membawa diri mereka ke dalam bidang domain awam. Oleh itu, responden pertama tidak berhak bergantung hanya pada syarat dan terma kontrak perkhidmatan, mengabaikan keperluan undang-undang yang jelas dan perlindungan yang berakar umbi dalam AKT dan Peraturan-Peraturan Disiplin MPSP. Hubungan di sini telah berubah daripada hubungan seorang majikan dan pekerja kepada hubungan yang menambatkan remedi undang-undang awam. Pemohon dengan itu menikmati perlindungan oleh undang-undang melalui s 16(4) AKT dan Peraturan-Peraturan Disiplin MPSP (lihat perenggan 61–64).

(5) Pemohon menuntut pembatalan pemecatannya oleh responden pertama. Dalam memecat perayu, responden pertama telah bertindak bawah Peraturan-Peraturan MPSP, satu undang-undang Persekutuan. Hujahan-hujahan yang dibangkitkan oleh pemohon adalah isu-isu undang-undang awam, iaitu satu pelanggaran keadilan semula jadi, kegagalan mematuhi s 16(4) AKT dan kegagalan mematuhi keperluan Peraturan-Peraturan MPSP. Isu-isu berkaitan dengan perkara disiplin harus ditentukan oleh semakan kehakiman kerana 'selalunya sebahagian

peranan mahkamah dalam prosiding undang-undang awam untuk mengawasi tribunal bawahan dan mahkamah dalam menyemak tindakan disiplin sedang melakukan peranan yang sama' (lihat perenggan 67).

(6) Secara luaran, proses membuat keputusan tercemar dengan elemen-elemen yang dinyatakan oleh pemohon, iaitu tidak sah, tidak rasional dan satu kesalahan prosedur. PK telah gagal untuk menghargai secara kehakiman keterangan dan/atau undang-undang yang dibentangkan hingga menjadikan keputusan beliau dengan jelas salah dan atas penelitian *curial*, mewajarkan campur tangan rayuan (lihat perenggan 71 & 73).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 329–407.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Aria Kumar @ Omar bin Abdullah & Anor v Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor [1994] MLJU 194; [1994] 4 CLJ 515, HC (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (folld)

Datuk Justine Jinggut v Pendaftar Pertubuhan [2012] 3 MLJ 212, CA (refd)

Dr Ganeshwaraan a/l KT Balakrishnan v Pengarah Kesihatan Negeri Perak Daruk Ridzuan and Ors [2010] MLJU 1072, HC (refd)

Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196; [1981] CLJ 85; [1981] CLJ Rep 53, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Gopalrao v State Government of Madhya Pradesh AIR 1954 Nag 90 (refd)

Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor [1999] 5 MLJ 222, HC (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

Malloch v Aberdeen Corporation [1971] 2 All ER 1278, HL (refd)

McClaren v Home Office [1990] ICR 824, HL (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (refd)
Najar Singh v Government of Malaysia & Anor [1976] 1 MLJ 203; [1976] 1 LNS 81, PC (refd)
Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68, FC (refd)
Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu [2010] 5 MLJ 295; [2010] 6 CLJ 1, CA (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Sentivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1, FC (refd)
R Ramachandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Ramchandra Gopalrao vs DIG Police AIR 1957 MP 126, HC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Regina v East Berkshire Health Authority, ex parte Walsh [1985] QB 152, CA (refd)
S Nanjundeswar v State of Mysore AIR 1960 SC 159, SC (refd)
Shamsiah bte Ahmad Sham v Public Services Commissions, Malaysia & Anor [1990] 3 MLJ 364, SC (folld)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; [2014] 6 CLJ 541, FC (refd)
Union of India vs T R Varma 1957 AIR 882, SC (refd)
Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2011] 5 MLJ 465; [2012] 1 CLJ 448, FC (refd)

Legislation referred to

Evidence Act 1950 s 74
Federal Constitution arts 132, 135(2), (5)
Industrial Relations Act 1967 s 20
Local Government Act 1976 s 16(4)
Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995 regs 4(2), 26, 27, 28, 29, 29(4), Part IV
Public Officers (Conduct and Discipline) Regulations 1993 reg 37(5)
Rules of Court 2012 O 53, O 53 r 3
Specific Relief Act 1950 ss 20, 20(1)(b)

Appeal from: Application for Judicial Review No 25–21–02 of 2014 (High Court, Pulau Pinang)

Vijaya Navaratnam (Vijaya Navaratnam) for the appellant.
Karin Lim (Murgan Maniam with her) (Presgrave & Matthews) for the respondents.

Asmabi Mohamad JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (the applicant in the High Court) against of the decision of the High Court dated 30 September 2015 that dismissed the appellant's judicial review application ('JR application') with costs of RM4,000 to be paid to the respondents.

[2] We heard this appeal on 8 September 2016. After perusing the records of appeal, the written submissions filed by the respective learned counsels and upon hearing learned counsels, we adjourned the matter for our consideration and decision. Before we adjourned the same, we ordered both learned counsels to further submit to us on three main issues:

(a) whether there was a requirement to appoint a committee of investigation pursuant to reg 29(4) of the MPSP Disciplinary Regulations to investigate the charge against the applicant?

(b) whether the decision-making process was tainted with biasness? and

(c) whether the court can order specific performance of a contract of service?

[3] We now give our decision and the reasons for the same.

[4] We will refer to the parties as they were described in the High Court, the applicant, the first respondent and the second respondent respectively.

BRIEF BACKGROUND FACTS

[5] This was a substantive JR application filed by the applicant to challenge his dismissal from the services of the second respondent.

[6] The facts were extracted from the various affidavits, the written submissions filed herein by the respective parties and the judgment of the learned judicial commissioner ('JC'). In order to save judicial time, some of the facts as highlighted by the respective parties in the above-mentioned documents are adopted herein with and/or without modifications.

[7] The applicant was an engineer (Grade 41) attached to the second respondent's office in Bukit Mertajam, Penang.

[8] The first respondent is the disciplinary authority of the second respondent, appointed pursuant to reg 26 of the Public Officers (Conduct and Discipline) Municipal Council of the Province Wellesley Regulations 1995

A ('the MPSP Disciplinary Regulations').

[9] On 14 March 2012, the applicant was transferred from the Engineering Department of the second respondent to its Health Services Department. Following from the transfer, the applicant filed Civil Suit No 21NCVC-14–04 B of 2012 to challenge the transfer. However, the same was dismissed by the High Court on procedural grounds. Aggrieved by the said decision, the applicant appealed to the Court of Appeal ('CoA') and the appeal too was dismissed by the CoA. The applicant then filed a judicial review application to challenge his transfer and the said case is still pending before the High Court. C

[10] By its letter dated 4 October 2013, the chairman of the first respondent informed the applicant of the first respondent's intention to take disciplinary action against the applicant with a view to dismissal or reduction in rank. The D applicant was given 21 days from the date of the receipt of the letter to make a written representation to the first respondent.

[11] The charge against the applicant was as follows:

E Bahawa tuan, Encik Mohd Sobri Bin Che Hassan (12245) Jurutera Gred J41 (No KP: 751215–02–5465), Jurutera Gred 41 semasa bertugas di Jabatan Perkhidmatan Kesihatan, Majlis Perbandaran Seberang Perai telah membawa isu pertukaran tuan dari Jabatan Kejuruteraan ke Jabatan Perkhidmatan Kesihatan kepada Ahli Dewan Undangan Negeri Penaga ketika itu, YB Azhar Bin Ibrahim yang seterusnya telah membangkitkan perkara tersebut dalam Mesyuarat Pertama F Penggal Kelima Dewan Undangan Negeri Pulau Pinang yang Kedua Belas yang telah berlangsung pada 30 April hingga 8 Mei 2012 jelas bercanggah dengan tatakelakuan Pegawai Awam dan boleh dikenakan tindakan tatatertib selaras dengan Peraturan-Peraturan Pegawai Awam Majlis Seberang Perai (Kelakuan dan Tatatertib) 1995. Perbuatan tersebut boleh ditafsirkan sebagai cubaan membawa G pengaruh luar iaitu melanggar peraturan 4(2)(h) seperti berikut:

4(2)(h) Seseorang pegawai tidak boleh —

(h) Membawa atau cuba membawa apa-apa bentuk pengaruh atau tekanan luar untuk menyokong atau memajukan tuntutan berhubungan dengan perkhidmatan awam, sama ada tuntutan itu adalah tuntutannya sendiri atau H tuntutan anggota-anggota perkhidmatan awam yang lain.

Jika tuan didapati bersalah, tuan boleh dihukum mengikut Peraturan 39, Peraturan-Peraturan Pegawai Awam Majlis Seberang Perai (Kelakuan dan Tatatertib) 1995.

I

[12] The applicant responded to the said letter vide a written representation dated 11 October 2013, denying the charge against him. In the same letter, the applicant had requested for a committee of investigation to be appointed by the first respondent to investigate the charge against him (see pp 378–381 of

appeal record J2/(2)). In he said written representations, amongst others, the applicant stated the following:

(a) he denied the charge against him;

(b) he denied having met YB Dato' Azhar bin Ibrahim, the Penaga State Assemblyman at the material time;

(c) by a letter dated 13 August 2013, the applicant had in fact given his full explanation to the Director of the Health Services Department, his Head of Department ('HOD') at the material time (p 383 AP J2/2);

(d) in the same letter, he had also requested for a committee of investigation to be appointed to investigate the charge against him, if the first respondent found his explanation insufficient or unsatisfactory;

(e) he also stated that he fully understood the specific Regulation of the MBSP Disciplinary Regulations, under which he was charged with. He clarified that he had no intention to get the support of the said Assemblyman, as at that material time he had already commenced an action against the second respondent in the High Court to challenge his transfer from the Engineering Department of the second respondent to the Health Services Department and the case was pending in court;

(f) in the relevant *Hansard* which documented the Penang State Assembly's proceedings where the matter concerning him was purportedly highlighted (at p 555 of appeal record J2/(3)), his name had been wrongly stated as Muhammad Subri Hj Hassan. His job description too had been wrongly stated as assistant director of building, instead of assistant director of engineering; and

(g) he had lodged a police report pertaining to the misquoting of his meeting with the said Assemblyman of Penaga.

[13] After the appellant sent his written representations to the first respondent, the appellant's HOD had also written to the chairman of the first respondent dated 18 October 2013, to state that the applicant's denial was valid, his written representations against the charge were reasonable and the decision of the first respondent to take disciplinary action with a view of dismissal or reduction in rank was not appropriate in the circumstances of the case.

[14] On 2 December 2013, the first respondent informed the applicant that pursuant to a meeting held on 28 November 2013, the applicant was found guilty and punished with dismissal (see p 392 of appeal record J2/(2)).

[15] Despite having requested for the notes of proceedings and all the relevant documents from the first respondent vide a letter dated 2 December

2013, the same was also denied by the first respondent.

[16] Aggrieved by the first respondent's decision, the applicant filed this JR application to challenge his dismissal from the second respondent. This JR application is related to a disciplinary action initiated by the first respondent against the applicant under regs 27–29 of the MPSP Disciplinary Regulations.

IN THE HIGH COURT

The applicants' case

[17] Before the High Court, learned counsel for the applicant submitted the following arguments:

(a) there were flaws in the manner the disciplinary proceedings were commenced against the applicant. The applicant's HOD was asked to look into the matter concerning the applicant vide a letter dated 15 May 2012. The applicant's HOD having received an explanation from the applicant then wrote to the first respondent stating that the applicant's explanation was valid. At the same time he had also attached the applicant's explanation to his letter and requested the first respondent to appoint a committee of investigation to investigate the matter in a rational manner. However, the first respondent had instead relied on the HOD's letter to initiate the disciplinary proceedings against the applicant;

(b) the commencement of the disciplinary proceedings against the applicant was not based on the report from the HOD of the applicant as claimed by the first respondent. Instead, the first respondent had acted on a frolic of its own without complying with the procedure as set out in the MBSP Disciplinary Regulations;

(c) there was failure on the part of the first respondent to appoint a committee of investigation to investigate into the alleged matter. Hence the applicant was denied the right of an oral hearing. As there was a letter issued by the applicant's HOD dated 18 October 2013 expressing his views that the applicant's explanation and/or reasons in his written representations were valid and that the decision to initiate the disciplinary proceedings with a view to reduction in rank and dismissal was unwarranted;

(d) the first respondent had breached s 16(4) of the Local Government Act 1976 ('the LGA') as it has denied the applicant the right to an oral hearing guaranteed under art 135(2) of the Federal Constitution ('the FC');

(e) the first respondent had acted in unholy haste in placing the blame on

the applicant and finding the applicant guilty under reg 4(2) of the MPSP Disciplinary Regulations;

(f) there was delay in initiating the disciplinary proceedings against the applicant. The alleged offence had taken place prior to 30 April 2012 and disciplinary action was commenced only on 4 October 2013. The action had been taken after the applicant had commenced an action in the High Court challenging his transfer which was dismissed by the CoA on preliminary points and thereafter the applicant had commenced a judicial review application against the respondents challenging his transfer from the Engineering Department to the Health Services Department; and

(g) as the decision to transfer the applicant from the Engineering Department to the Health Services Department was made by the president and the secretary of the second respondent, and that the applicant had filed a case against the respondent, the Panel comprising of the president and the secretary of the second respondent, could not have conducted the disciplinary proceedings in a fair manner. Hence, the decision to dismiss the applicant could be tainted with biasness.

The respondent's case

[18] The respondent, on the other hand, submitted as follows:

(a) the LGA did not make provision for the first respondent which is a statutory committee established under s 16(4) of the LGA to sue and be sued. Therefore, the first respondent could not be named as a party to the JR application;

(b) the second respondent is a local authority established under the LGA, is a body corporate and may sue and be sued;

(c) the applicant is not a holder of public office. Therefore, the applicant is not entitled to the protection under art 135(2) of the FC. Just because MPSP Disciplinary Regulations are applicable to the applicant that alone will not have the effect that the applicant is a public officer who is entitled to the protection under art 135(2) of the FC;

(d) the applicant cannot make an issue over the decision of the second respondent to transfer him from one department to another department as that is the prerogative of the second respondent. The applicant was transferred within the second respondent's organisation to carry out specific duties within his expertise. The applicant's transfer did not involve any changes or demotion in grade, position, status and reduction in salary. Instead, the applicant remained in the Engineering Services classification and he held the post of an Engineer Grade 41 in the Health Services Department without losing any benefits. His acting position as a

Grade 44 Engineer in the new department was not affected. The transfer of the applicant was in accordance with the applicant's contract of service and did not breach any of the terms and conditions of his service. The applicant was still paid his remunerations;

(e) the issue raised by the YB Dato' Azhar concerning the transfer of the applicant at the meeting of the state assembly was directly related to the applicant. The *Hansard* 2HB Report had clearly stated that the said state assemblyman had met with the applicant and discussed the issue pertaining to his transfer. As the *Hansard* is a public document, the first respondent could rely on that report to institute disciplinary proceedings against the applicant. The attempt to bring any form of influence or external pressure to support or pursue the applicant's claim against the second respondent's decision to transfer the applicant from the Engineering Department to the Health Services Department at the meeting of the Penang State Assembly was a serious breach of the MPSP Disciplinary Regulations;

(f) with respect to the appointment of the committee of investigation to inquire or investigate the applicant's case as requested by the applicant, the first respondent argued that the first respondent is vested with the discretion under reg 29(4) of the MBSP Disciplinary Regulations to appoint the said committee of investigation if it requires clarification pertaining to the charge. The decision whether to appoint the committee of investigation lies with the first respondent. The court should not usurp the discretion given by the law on the first respondent. In the case of the applicant, the first respondent did not require further clarification. The applicant could not insist or demand that a committee of investigation to be appointed. Failure to do so did not amount to breach of natural justice;

(g) the applicant had failed to exculpate himself from the charge proffered against him;

(h) the applicant had been accorded every opportunity to defend himself from the charge proffered against him. The procedure under MPSP Disciplinary Regulations had been assiduously followed by the first respondent. A fair hearing does not mean that the applicant must be given the right to an oral hearing. In this case the applicant was given the right to make written representations as envisaged by the MPSP Disciplinary Regulations and that sufficed;

(i) with respect of the applicant's claim that the decision-making process which resulted in the applicant's dismissal was tainted with biasness, the first respondent argued that the President, Secretary and the members of the second respondent were appointed pursuant to the LGA and this had

been determined by the law. Therefore, the issue of biasness did not arise at all. These people were performing their statutory functions as stipulated by the law;

(j) on the issue of delay in instituting the disciplinary proceedings, the respondent argued that in this case the action was instituted within reasonable time and the applicant was not prejudiced at all;

(k) on the issue that the applicant was not supplied with the documents he required to defend himself from the charge proffered against him, the respondent submitted that, the applicant had failed to request for the documents at the earliest possible opportunity. Further the first respondent argued that the MPSP Disciplinary Regulations did not provide for documents to be supplied to the applicant; and

(l) pertaining to the issue whether the court can order a relief in the form of a specific performance, the respondents submitted the case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135, is applicable where it was held that the court would not order a relief in the form of specific performance of contract of service.

DECISION OF THE HIGH COURT

[19] At the conclusion of the trial, the learned JC dismissed the applicant's JR application with costs. Having perused the cause papers, written submissions file by both parties and heard the respective learned counsels, the learned JC identified three main or material issues to be determined by the court as follows:

(a) whether the failure to hold a hearing or inquiry and investigation has resulted in a breach of natural justice and/or procedural fairness?

(b) whether the respondent have been guilty of bias against the applicant? and

(c) whether the court can order specific performance of a contract of service?

[20] Briefly the decision of the learned JC was premised on the following findings of fact and law:

(a) the applicant did not fall within the category of officers defined under art 132 of the FC. This was supported by the Federal Court case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* which ruled that employees of the local council are not holders of public office. Hence they are not entitled to the protection under art 135(2) of the FC;

(b) the applicant was employed based on a contract of service. In terms of

discipline he was subject to the terms and condition of his employment and the MPSP Disciplinary Regulations. Whatever rights that had been accorded to the applicant must be examined within the context of the contract of service, the MPSP Disciplinary Regulations and any other circulars, guidelines or orders expressly incorporated in the applicant's contract of service;

(c) the issue pertaining the applicant's transfer from one department to the other department of the second respondent, the JC ruled that this was the management's prerogative. The court will normally not interfere with such prerogative. The transfer did not involve any change in status, grade, position and salary of the applicant. On the issue of transfer of public officers, the court had always been consistent in holding that unless provided otherwise, a public officer may be transferred from his station to any other location within the employer's organisation. The learned JC was guided by these cases: *Pengarah Pelajaran, Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68; *Aria Kumar @ Omar bin Abdullah & Anor v Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor* [1994] MLJU 194; [1994] 4 CLJ 515; *Dr Ganeshwaraan a/l KT Balakrishnan v Pengarah Kesihatan Negeri Perak Daruk Ridzuan and Ors* [2010] MLJU 1072;

(d) the right to be heard does not necessarily mean a right to an oral hearing (see *Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Sentivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149). All this cases seem to suggest that in cases of this genre, the right to be heard as envisaged in did not require a public officer to be to be given an oral hearing. The procedure in the Public Officers (Conduct and Discipline) Regulations 1993 applicable to the public officers, from which the MPSP Disciplinary Regulations had been adopted had made provision for a written representation to be made. This in itself is sufficient to satisfy the test that the right to be heard had been accorded to the person facing disciplinary action with a view to reduction in rank or dismissal;

(e) pertaining to the request by the applicant for a committee of investigation to be appointed to investigate the charge against him, the learned JC ruled that it is for the first respondent to decide if the applicant's case required further clarification. As such the court could not interfere with the decision of the first respondent not to appoint a committee of investigation;

(f) the case of *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor*

[2011] 5 MLJ 465; [2012] 1 CLJ 448 does not strictly apply to the applicant as the applicant is not a public officer, hence the provision of art 135(2) of the FC is not applicable to him. Further in Yusuf Sudin the charges proffered against Yusuf Sudin appeared to be general in nature and lacking in particulars. Unlike the charge against the applicant which is so clear;

(g) the respondent's reliance on the *Hansard* was justified as the *Hansard* is a public document within the meaning of s 74 of the Evidence Act 1950;

(h) on the issue that there was failure on the part of the first respondent to furnish the documents requested by the applicant, the learned JC stated that the MPSP Disciplinary Regulations do not provide for documents to be furnished to the person facing disciplinary action. Further, the documents requested for were not relevant to the charge proffered against the respondent;

(i) the claim of the applicant that there was delay in the institution of the disciplinary proceedings against the applicant, the learned JC found that the proceedings were conducted within reasonable time. The applicant was never prejudiced. The learned JC was guided by the case of *Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 MLJ 222;

(j) there was no reason for the applicant to claim that the first respondent was bias towards him and ought to be disqualified from deciding the case against the applicant. In any event, there was no application filed and/or request made for the president and secretary of the second respondent to be recused from hearing the case. The LGA and the MPSP Disciplinary Regulations had conferred the power to the committee to adjudicate the matter, otherwise there would be no one else who may be in a position and/or competent to decide the matter;

(k) with respect to the relief in the form of specific performance, the learned JC, was being guided by the case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* where the Federal Court had ruled that as a matter of principle the court will not order specific performance of a contract of service between master and servant except in cases involving industrial relations where an employee was claiming for reinstatement on ground of dismissal without just cause or excuse or under s 20 of the Industrial Relations Act 1967 or in cases involving a public officer as set out under art 132 of the FC. As the employees of the second respondent, being an employee of a local authority he is employed purely on a contractual basis and he is not a public officer envisaged by art 132 of the FC, he could only claim damages if he could establish that his dismissal was in breach of the contract of service; and

(l) pursuant to s 20(1)(b) of the Specific Relief Act 1950, an employee who

has been wrongfully dismissed cannot seek specific performance of his contract of employment. This is consistent with the common law position that a contract of employment is a contract dependent on the volition of the parties. As such, it cannot, in absence of special circumstances be specifically enforced either by a declaration that the contract still subsists or that the dismissal is invalid or void.

THE APPEAL

[21] Before us, whilst adopting the written submissions filed in court, learned counsel for the applicant focused on the three main issues resolved by the learned JC for our determination.

OUR DECISION

The law

[22] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[23] In the course of that, we had sought guidance from the very often-quoted case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[24] Reference was also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[25] We were also mindful of our role in dealing with the appeal at hand which originated by way of a judicial review application. On the proper approach the court should adopt in dealing with the appeal, both learned counsels for the appellant and the respondents had addressed this issue extensively in learned counsels' written as well as oral submissions. We do not propose to deal with the law pertaining to the scope of judicial review at great length as the law is trite. We were guided by a plethora of cases which ruled that judicial review is not an appeal from the decision but a review of the manner in

which the decision was made and that the High Court in hearing the judicial review is not entitled to consider whether the decision itself, on the merits of the facts, was reasonable and fair. Suffice for the court to refer to the recent Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1, where His Lordship Suriyadi Halim Omar FCJ had stated as follows:

> [69] A judicial review is a court proceeding where a challenge is made on the decision of the relevant authority or entity (in this case the appellant) ie, by challenging the lawfulness of the decision-making process. This is trite law. Generally, the court dealing with the judicial review application in a supervisory capacity is not to delve into the merits of the case. In other words, the evidence is not reassessed. The court is merely to quash the decision of the relevant authority, if need be, and not to substitute with what it thinks is the correct decision. We are not here to usurp the powers of the designated authority.

[26] Notwithstanding the above, we were also aware that the law on judicial review had developed so as to give the power to the court hearing a judicial review matter to scrutinise such decision not only for process, but also for substance to determine the reasonableness of the decision. Therefore, the conventional concept that judicial review is concerned only with the review in the manner a decision is made is no longer the correct approach to be adopted by the court in dealing with judicial review cases (see *R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014] 6 CLJ 541; *Datuk Justine Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[27] These principles were reiterated in the recent Federal Court case of *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent* above in the following terms:

> [71] However, the Federal Court in the landmark decision of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 held that the decision of an inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality', which not only permits the courts to scrutinise the decision-making process but also the decision itself. In short, it allows the courts to delve into the merits of the matter.
>
> [72] The approach of illegality and irrationality was recognised and applied by *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525. This court in succinct terms said:
>
> > On the facts of this case, we find MTUC had failed to show that the Minister's decision was illegal, irrational and flawed on the grounds of procedural impropriety.
>
> [73] It is now clear, and here to stay, that the decision of an inferior tribunal may also

be reviewed on the grounds of illegality and irrationality. *The distinction between a review application and an appeal thus appears to no longer exist* (see also *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

[28] Guided by the above established principles, we had therefore carefully examined the documents that were placed before us in the form of the records of appeal to ascertain if the learned JC had arrived at his decision correctly on the basis of the relevant law and evidence before him.

[29] We observed that the learned JC had dealt with the facts and the law very extensively, contrary to what was stated by learned counsel for the applicant that the learned judge had merely focused on three main issues. This is reflected in the learned judge's grounds of judgment, the gist of which had been set out in paras 19–20 above.

[30] Before us, learned counsel for the applicant had informed us that she would be focusing on the three major issues as stated above for our consideration.

Issue 1: Whether the failure on the part of the first respondent to appoint a committee of investigation to investigate the charge had resulted in the decision making process to be tainted with procedural impropriety?

[31] The applicant contended that despite requests having been made by him as well as his HOD for a committee of investigation to be appointed to investigate the charge against him, the first respondent had failed and/or refused to adhere to the said requests. Due to the failure on the part of the first respondent to accede to these requests, the process leading to his dismissal was tainted with procedural impropriety and/or there was breach of natural justice.

[32] We noted that the MPSP Disciplinary Regulations were adopted from the Public Service (Discipline and Conduct) Regulations 1993 with modifications to suit the requirements of the second respondent. We have perused Part IV of the MPSP Disciplinary Regulations and found that in terms of substance and procedures, the provisions are pari materia to the 1993 Regulations. Hence we are of the view that decided cases touching the provisions of 1993 Regulations are equally applicable and/or are relevant in interpreting the MPSP Disciplinary Regulations. We are not short of authorities on the topic of 'the right to be heard' and/or 'a reasonable opportunity of being heard' as envisaged by the FC. We noted that the language of art 132(5) of the FC had been adopted in the proviso to s 16(4) of the LGA which states as follows:

The Commissioner of the City of Kuala Lumpur in the case of the Federal Territory, or the Mayor or President or his representative who shall be the Councillor, the Secretary and one other Councillor in the case of local authorities may appoint such persons to the offices shown on the list so approved and may reduce in rank or dismiss such persons from office and may appoint others in their stead:

Provided that the reduction in rank or dismissal from office of any Head of Department or his Deputy shall not take effect until such reduction in rank or dismissal has been confirmed by the State Authority:

Provided further that no officer or employee shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard.

[33] In gist the right to a fair hearing and/or a reasonable opportunity of being heard that is guaranteed to the public servant is also accorded to the officers and employees of the second respondent. There is a statutory recognition given to the officers and/employees of the local authority (Majlis Perbandaran Seberang Perai (MPSP) or the second respondent) that no officers of the second respondent shall be reduced in rank or dismissed without being given a reasonable opportunity of being heard. As the provisions of the relevant law under discussion are similar we are of the view that cases which interpreted the provisions touching the public officer will also be useful to guide us in resolving the issues before us.

[34] As we have highlighted in the preceding paragraphs, the procedures involving disciplinary proceedings with a view to dismissal and reduction in rank in the case of officers and employees of the second respondent are somewhat similar to that of the 1993 Regulations as the 1993 Regulations were adopted by the second respondent with modifications to suit its requirements. Hence, the cases which dealt with the 1993 Regulations are relevant for purposes of interpreting the MPSP Disciplinary Regulations. In the case of the 1993 Regulations our courts have consistently held that so long as the disciplinary authority has assiduously followed the procedures prescribed in the 1993 Regulations, the requirements of a reasonable opportunity of being heard and or procedural fairness have been satisfied. The courts have also held that it is sufficient for the officer facing disciplinary proceeding to be given the opportunity to make written representations to the disciplinary authority to answer to the charge proffered against him. Fair hearing does not mean the officer facing disciplinary proceedings must be heard orally either in person or by his advocate. The oral hearing is only relevant if the disciplinary committee *is of the opinion* the case involving the officer facing disciplinary proceedings requires clarification. This principle had been stated in the case of *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203; [1976] 1 LNS 81 ('Najar Singh') where the court held that so long as the public officer had been given the opportunity to make a written representation in answer to the charge against him, that would suffice to satisfy the test that he had been accorded a

reasonable opportunity of being heard envisaged by art 135(2) of the FC. We are of the view that we can be guided by these cases as similar provisions of the MPSP Disciplinary Regulations were being discussed (see *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203; [1976] 1 LNS 81; *Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Sentivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149).

[35] We found that except for the matter we propose to discuss under issue 2, the first respondent had assiduously complied with the procedures outlined under Part IV of the MPSP Disciplinary Regulations. We were of the view that the first respondent had given the applicant a reasonable opportunity of being heard by according the applicant the right to make a written representation. Drawing the analogy from the cases applicable to the public officers, we were of the view that the applicant had been accorded a reasonable opportunity of being heard. As such the applicant could not complain that he had been denied the right to be heard as entrenched under s 16(4) of the LGA.

[36] Turning now to the allegation of the applicant that the disciplinary proceedings were tainted with procedural impropriety as the first respondent had failed to appoint the committee of investigation to investigate the charge against him. We noted that the contents of reg 29(4) is word for word similar to reg 37(5) of the 1993 Regulations. The old provision in General Order 25(6) of the General Order that was applicable to public officer had similar provisions. There are ample authorities on point which had delved with the said specific provisions and we are guided by these authorities.

[37] It is trite that the appointment of the committee of investigation is at the discretion of the disciplinary authority and the officer could not demand for the same to be appointed and the court ought not to interfere with the discretion of the disciplinary authority.

[38] Reference is made to the majority decision of the Federal Court in *Kerajaan Malaysia & Ors v Tay Chai Huat* where it was decided as follows:

> [27] I dare say that the law is settled in cases of this genre. This can be gleaned from several decisions which were decided prior to Utra Badi and Vickneswary; see *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61; [1994] 3 CLJ 532, *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333, *Zainal bin Hashim v Government of Malaysia* [1979] 2 MLJ 276; [1979] 1

LNS 132 and *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203; [1976] 1 LNS 81.

[28] From the authorities referred to above, I am of the view that the law is settled. Thus, *an oral hearing may be given in instances where the disciplinary authority considers that the case against the officer requires further clarification and consequently appoint a Committee of Inquiry pursuant to GO 26(5) of the GO (Chapter D). If the disciplinary authority considers that no further clarification is required, I do not think that the officer concerned can insist or demand that a Committee of Inquiry be appointed.*

[39] The court also rejected the earlier decision of the Federal Court in the case of *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; [2012] 1 CLJ 448, where it was decided as follows:

[54] This court create precedents. The use of precedent is an indispensable foundation on which to decide what is the law and how it should be applied in individual cases. *Utra Badi* and *Vickeswary* are decisions that settled the law in cases of this genre with finality. I would think that this court would have need to hesitate long before distinguishing *Utra Badi* and *Vickneswary* on inadequate grounds or on a hypothetical issue raised by the appellants in appeals before this court such as whether there are exceptions to the ratio decidendi formulated in both authorities. Such hypothetical issues raised in cases of this genre can have disruptive and seemingly unfair consequences and extremely capricious results. It creates uncertainty in the law and would seriously hinder administration of the general orders by the government departments resulting in administrative confusion. For the aforesaid reasons adumbrated, I am unable to follow the majority decision in *Yusof Sudin*.

[40] Hence, guided by the above authorities, we agree with the learned JC, it is for the first respondent to decide whether a Committee of Investigation ought to be appointed to investigate the charge and the applicant could not demand for the same. This approach is also in tandem with reg 37(5) of the 1993 Regulations which provides as follows:

(5) If *the appropriate Disciplinary Authority is of the opinion* that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification.

[41] The words 'if the Disciplinary Authority is of the opinion' in the above-mentioned regulation showed that the discretion is upon the disciplinary authority to decide whether a committee of investigation ought to be appointed or otherwise and the court ought not to interfere with that discretion. Regulation 29(4) of the MPSP Disciplinary Regulations were couched in similar language. We were of the view, cases applicable to reg 37(5) of the 1993 Regulations would likewise be applicable to the case at hand. In view of the above, we were constrained to hold that the point taken up by the applicant that he was denied the right to be heard as the first respondent had

failed to constitute a committee of investigation to inquire into the charge against him has no merits and ought to be rejected by this court.

Issue 2: Whether the decision-making process was tainted with biasness as the respondents had highlighted the applicant's previous conviction in the working paper that was submitted to the disciplinary secretariat one day before the deliberation of the disciplinary committee, without giving the applicant the opportunity to rebut the same?

[42] The applicant contended the proceedings that led to his dismissal was tainted with procedural impropriety as the first respondent had considered a report it received from the disciplinary secretariat which was detrimental to the applicant, without giving the applicant the opportunity to explain or controvert the same (see p 449–552 of appeal records *Jld* 2/(3)). The crucial portion of the detrimental report was the information pertaining to his previous misconduct where he was given a caution/warning with annual increment being deferred to twelve months for an offence for being late to work without any valid explanation (see para 6.9 at p 551 of the appeal record *Jld* 2/(3)).

[43] We have examined the process undertaken by the first respondent which resulted in the dismissal of the applicant and found that there is merit in the applicant's argument. The first respondent had proceeded to impose the punishment of dismissal on the applicant without giving the applicant the opportunity to explain and/or contradict the detrimental portion of the report. We are of the view that this in itself constituted a breach of the rule of natural justice and or procedural unfairness/impropriety.

[44] We were guided by the principles enunciated in the in often-quoted cases of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 and *Shamsiah bte Ahmad Sham v Public Services Commissions, Malaysia & Anor* [1990] 3 MLJ 364. It is not disputed that the working paper which contained the material which was detrimental to the applicant was given to the first respondent one day before the decision to dismiss the applicant was deliberated on, without giving the opportunity to the applicant to explain or controvert the same. It is also not disputed that this information would be prejudicial to the applicant.

[45] In *B Surinder Singh Kanda v The Government of the Federation of Malaya* (*Surender Singh Kanda*), a disciplinary proceeding was commenced against the appellant, an Inspector of Police in the Royal Federation of Malaya Police leading to his dismissal from the said service. In the course of the proceedings, a report of the board of inquiry which contained severe condemnation of the appellant was sent to the adjudicating officer before he sat

to inquire into the charge. The adjudicating officer read the contents and had full knowledge of the contents of the report. However, the appellant never had it until the fourth day of the hearing. The report contained detailed evidence of the witnesses as well as the inquiries made by the board which were detrimental to the appellant. The appellant raised the issue that he was dismissed without being given a reasonable opportunity of being heard by the board, in that, he was not asked to correct or contradict the detrimental information contained in the report. The Privy Council had the opportunity to elaborate on the clause, 'a reasonable opportunity of being heard' contained in art 135(2) of the FC as follows:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v Rice* [1911] AC 179 at p 182; 27 TLR 378 down to the decision of Their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 PC. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to Their Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v Evans* [1951] 2 TLR 1189 to which might be added *Rex v Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445 and many others.

[46] The facts in the case of *Shamsiah bte Ahmad Sham v Public Services Commissions, Malaysia & Anor* ('Shamsiah') were quite close to the case at hand. In *Shamsiah*, a book-binder in the Government Printing Department was dismissed by the public service commission ('PSC') after she was found guilty of negligence and dereliction of duty. She had challenged her dismissal by the PSC on the ground that the PSC had taken into consideration extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director General of the Government Printer's Department to the PSC, without giving her the opportunity to explain, contradict or rebut the same. The court was of the view that there was implicit acknowledgement on the part of the PSC that it had the information of the appellant's several misconducts as well as the punishments imposed on her. The record of service which was submitted to the public service commission contained the information pertaining to the misconducts and the punishment which had been imposed on her comprising of four times being late to report for duty and three times for taking longer time to complete the tasks allocated to her for which she was punished with a warning, a fine and

a withholding of salary respectively. The court noted that in the show cause letter issued to her at para 2, contained the following detrimental words:

> 2. Apart from that, it has been observed that several disciplinary actions have been taken against you by the Board of Discipline of your department on account of similar defaults as well as other defaults. *However, they had no effect on you* (see p 366 E left column).

[47] The court in *Shamsiah* relied on the Supreme Court case of *S Nanjundeswar v State of Mysore* AIR 1960 SC 159 which referred to the Supreme Court case of *Union Of India vs T R Varma* 1957 AIR 882 which ruled that:

> the principle of natural justice require that no materials should be relied upon against the person charged without his being given an opportunity of explaining them.

[48] Apart from the above case, the court had also referred to the case of *Ramchandra Gopalrao vs DIG Police* AIR 1957 MP 126 where the officer concerned was never informed of the fact that his record of past service and complaints would be considered in deciding the appropriate punishment to be imposed on him, in the event, he was unable to exculpate himself from the charge proffered against him. The court agreed that the competent authorities were entitled to refer to previous conducts or complaint before deciding on the fate of the officer, but not until the officer was given the opportunity to take a proper defence to the proposed action to be taken against him.

[49] In *Gopalrao v State Government of Madhya Pradesh* AIR 1954 Nag 90, the court went on to say:

> If the civil servant is not apprised of the record of service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a reasonable opportunity to show cause against the proposed action. Normally, the question of punishment is linked up with the gravity of the charge, and the penalty that is inflicted is proportionate to the guilt.

[50] Having considered the above quoted cases, the Supreme Court was of the view before any decision affecting the right of the appellant is made, the PSC must ensure that the appellant is apprised of the record of her past service and also the fact that it would be taken into consideration in imposing punishment. Failing which she cannot be deemed to have been given a reasonable opportunity to show cause against the proposed action. The Supreme Court was of the view that there was implicit acknowledgement on the part of the PSC that it had the information of the appellant's several misconducts as well as the punishments imposed on her. The court noted that in the show cause letter issued to her contained the following words which were prejudicial to the appellant:

2. Apart from that, it has been observed that several disciplinary actions have been taken against you by the Board of Discipline of your department on account of similar defaults as well as other defaults. *However, they had no effect on you* (see p 366 E left column).

[51] The Supreme Court was of the view that the above-quoted paragraph reflected the state of mind of the PSC and according to the court this in itself constituted an intrinsic evidence, that the PSC had taken into account to dismiss the appellant from the service of the government, albeit, in good faith.

[52] Turning now to the case at hand, it is not disputed that the applicant's previous misconduct was within the knowledge of the first respondent and from the record before us, the first respondent did not provide such information to the applicant. Neither was the applicant informed that such information may be used against him in meting out the punishment.

[53] Based on the above we were of the view that the process undertaken by the first respondent had infringed the rule of natural justice and/or was tainted with procedural impropriety. Hence, it is our finding that the learned JC had failed to properly evaluate the evidence before him and/or appreciate the relevant laws applicable to the factual matrix of this case in making his ruling against the applicant on this point.

Issue 3: Whether a relief in the form of specific performance is available to the applicant

[54] The learned JC ruled that, the applicant did not fall within the category of officers defined under art 132 of the FC and this was supported by the Federal Court case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* which ruled that employees of the local council are not holders of public office. Hence, they are not entitled to the protection under art 135(2) of the FC.

[55] The learned JC further held that, the applicant was employed based on a contract of service. In terms of discipline he was subject to the terms and condition of his employment and the MPSP Disciplinary Regulations. Whatever rights that had been accorded to the applicant must be examined within the context of the contract of service, the MPSP Disciplinary Regulations and any other circulars, guidelines or orders expressly incorporated in the applicant's contract of service.

[56] The applicant in this case did not pray for a relief in the form of specific performance. What was sought amongst others, was an order to quash the decision of the first respondent to dismiss him from the employment of the

second respondent. The respondents argued that the relief sought by the applicant was in the form of a specific performance as the applicant had sought for the decision to be quashed and for him to be reinstated to the post he held prior to his dismissal.

[57] We have carefully considered the arguments of the respective learned counsels under this issue. Guided by the cases cited such as *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135, *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1, the respondents argued that the court will not order the specific performance of a contract of service entered into between a master and servant or grant declaratory relief which has the effect of granting specific performance on a claim of wrongful dismissal. Employees of local authorities, like in the case of the applicant, who was employed purely on contractual basis are not holders of public offices as they are not classified under any of the categories stipulated under art 132 of the FC. The claim for reinstatement under s 20 of the Industrial Relations Act 1967 and claim by public officers under art 132 of the FC order are not available to the officers of the second respondent. At most the officer of the local authorities, like the applicant, is only entitled to damages provided if he can prove that he was wrongfully dismissed due to breach of the terms and conditions of his contract of service.

[58] The principle illustrated in *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor*, was reiterated in the case of *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1 where the CoA held that to suggest that such a relief is applicable to the officer of the local authority, there must be some form of statute of similar effect to support the claim. Otherwise a relief in the form of a specific performance or a declaration that the dismissal and/or termination is null and void and that he be reinstated could not be ordered by the court. This principle is further supported by s 20 of the Specific Relief Act 1950. The learned JC had stated that s 20 of the Specific Relief Act 1950 is consistent with the common law position that a contract of employment is a contract dependent on the volition of the parties, it cannot, in the absence of special circumstances, be specifically enforced either by declaration that the contract still subsists or that the dismissal is invalid or void.

[59] The applicant, on the other hand argued that the learned JC had ignored the fact that the case before His Lordship was a judicial review application, and the prayers sought amongst others was to quash the decision of the first respondent in dismissing the applicant from the services of the second respondent for procedural impropriety and not a case where specific performance was sought. It was further argued that the reliance on the two

cases, *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* and *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu* [2010] 5 MLJ 295; [2010] 6 CLJ 1 was misplaced. In *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor*, the applicant was seeking for a declaration that he was still a market supervisor, and entitled to all salary and benefits and other relief such as an enquiry to be conducted to determine the amount of salary, damages and cost. In the case at hand, the applicant was merely seeking for an order of Certiorari to quash the decision of the first respondent. As such the learned JC had gone on a frolic of his own by adopting the two cases cited above blindly without examining the facts and the law involved.

[60] From the judgment of the learned JC, we found that the learned JC was more persuaded by the argument of the respondents that the relief in the form of specific performance and/or the like effect could not be ordered. The learned JC relied on the two exceptions enunciated in the case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor*, in that, firstly, cases involving industrial relations where an employee was claiming for reinstatement on ground of dismissal without just cause or excuse or under s 20 of the Industrial Relation Act 1967 or secondly in cases involving a public officer as set out under art 135(2) of the FC. The learned JC, was being guided by the above two cases where the Federal Court and the Court of Appeal respectively had ruled that as a matter of principle the court will not order specific performance unless the case falls under the two exceptions stated above. The learned JC further ruled that as the employees of the second respondent, being an employee of a local authority he is employed purely on a contractual basis and he is not a public officer envisaged by art 132 of the FC. At most he could only claim damages if he could establish that his dismissal was in breach of the contract of service.

[61] We are of the view that the learned JC has erred in adopting the above-mentioned cases without fully appreciating the law and the procedures involved in these cases. The learned JC had failed to consider, in the case at hand there is a specific provision in the LGA which provides the guarantee of a reasonable opportunity of being heard to be accorded to the applicant facing disciplinary proceedings with a view to reduction in rank and/or dismissal. The guarantee is further entrenched by way of a legislation in the form of MPSP Disciplinary Regulations which provide the procedures to be complied with in the event the first respondent proposes to take disciplinary action against the applicant with a view to dismissal or reduction in rank. The statutory requirements stipulated in the LGA and the procedures outlined in the MPSP Disciplinary Regulations were not available to the officers and/or employees in the two cases relied by the respondent and further endorsed by the learned JC. Hence these cases ought to be distinguished.

[62] By codifying the provision for a reasonable opportunity to be given to the applicant for cases involving reduction in rank and/or dismissal, something equivalent to art 135(2) of the FC and legislating of the MPSP Disciplinary Regulations, the respondent had brought themselves into the realm of public law domain. Hence, there is a special guarantee given to the officers and/or employees of the second respondent. The relationship is no longer a plain master and servant relationship as envisaged in the two cases cited by the respondents and relied by the learned JC.

[63] The first respondent is not entitled to rely only on the terms and conditions of contract of service, ignoring the clear statutory requirements and protection entrenched in the LGA and the MPSP Disciplinary Regulations. In this case, the applicant's employment was supported by statute thereby making it subject to the requirement of natural justice, the non-observance of which will allow the court to scrutinise the decision not only for process but also for substance. We refer to the case of *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 referred to in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196; [1981] CLJ 85; [1981] CLJ Rep 53. The relevant passage in *Malloch v Aberdeen Corporation* Lord Wilberforce said:

> One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), this must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or status which is capable of protection. If any of these elements exist, then in my opinion, whatever the terminology used, and even though in some inter parte aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, the failure to observe them may result in a dismissal being declared void.

[64] In the case involving the applicant, the relationship is not merely a master servant relationship but the employment was supported by the LGA and the MPSP Disciplinary Regulations. Hence, the protection accorded to the officer of a local authority is special, because in an ordinary contract of employment or personal service, the employee need not necessarily be given the opportunity of being heard before a decision is made to reduce him in rank or to dismiss him from the employment. This relationship has changed from a pure master and servant relationship to a relationship which attract public law remedy. Like the public officers, the applicant herein enjoys certain protection by the law through s 16(4) of the LGA and the MPSP Disciplinary Regulations. The protection given to the applicant is special as in the normal contract of service and/or employment or personal service, the employee need not be given a reasonable opportunity of being heard in cases of reduction in rank or dismissal.

[65] We were of the view that the case at hand raised public law issues as it is a decision and action taken by the first respondent in pursuance of the provision of an act of Parliament, the LGA that is being impugned. As such a decision taken by the first respondent with regard to the applicant as an officer of the second respondent in his duties is one which has implications for the public as a whole and in consequence of this that the public law is concerned with the decision-making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case, the second respondent and in the circumstances of the case at hand, the protection of the law that it is entitled to by the process available under O 53.

[66] We would like to refer to the judgment of Lord Woolf LJ in the case of *McClaren v Home Office* [1990] ICR 824 where the cause of action raised issues of private law and not public law. The private law issues were pertaining to the breach of the 'Collective Agreements' entered into between parties. However, the Law Lord made a distinction between contractual rights and disciplinary matters, which are matters of public law to be decided by an application for judicial review. At p 16 of the judgment Woolf LJ states the law:

> (2) there can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the crown, and it is not domestic or wholly informal, its proceedings and determinations can be appropriate subject for judicial review.

[67] In this appeal, the issues raised in the pleadings are substantively public law issues. The applicant were seeking to nullify his dismissal by the first respondent. In dismissing the applicant, the first respondent had acted under the MPSP Disciplinary Regulations, a federal law. The grounds raised by the applicant are public law issues, namely a breach of natural justice, failure to comply with s 16(4) of the LGA and failure to comply with the requirements of the MPSP Disciplinary Regulations. Further, in England itself, the House of Lords in *McClaren v Home Office* held that issues pertaining to disciplinary matters must be determined by judicial review, as 'it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role'.

[68] In *Regina v East Berkshire Health Authority, ex parte Walsh* [1985] QB 152 Sir John Donalson MR, delivering one of the three judgments of the court declared:

> [25] But if there is a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff then this injects the element of public law to attract remedies under administrative law. This is elaborated by Sir John Donaldson MR in the case of (*R v Berks Authority, ex parte Walsh*) where he said:
>
> > In all three case there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff. In *Vine v National Dock Labour Board* [1957] AC 488 the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In *Ridge v Baldwin* [1964] AC 40 the power to dismissal was conferred by statute: s 191 of the Municipal Corporations Act 1882 (45 & 46 Vict c50). In *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 again it was statutory: s 3 of the Public Schools (Scotland) Teachers Act 1882 (45 & 46 Vict c18) Lord Wilberforce said, at pp 1595–1596, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract remedies of administrative law ...
>
> ...
>
> [28] And this is what the High Court found:
>
> > In this case, however, it is my opinion that in making a disciplinary award of dismissal, the Home Office (to use the comprehensive term to include the department and the Secretary of State so distinguished by the respondent itself in this case) was performing the duties imposed upon it as part of the statutory terms under which it exercises its power, I conclude therefore that this court in the exercise of its supervisory jurisdiction can come to the aid of the applicant in this case and I am glad that it can.
>
> [29] The principle was subsequently reiterated by Lord Woolf in *Mclaren v The Home Office* [1990] ITLR 338 where he declared:
>
> > There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or thew employee is entitled or required to refer dispute affecting their relationship.

[69] The Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 at p 161 held:

> Thus, the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power. Though the dismissal involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the

appellant underpins the public law element in this case. This is not a case of a public authority being delegated with authority to hire and fire much like what has occurred in *R n East Berkshire Health Authority, ex parte Walsh* and *Wendal Swann v Attorney General of the Turks and Caicos Islands*. Here, a special statutory provision bearing directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the remedies of administrative law making this case amenable to judicial review.

[70] Based on the above authorities, it is our humble view that the learned JC was plainly wrong when he decided that His Lordship was bound by the principles enunciated in *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* and *Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin Hj Abu*. As such we were of the view that there was lack of judicial appreciation of the facts and the law apparent in the case before His Lordship.

[71] We have perused the appeal record and the written submissions of the respective parties, we agree with the learned JC on all the issues decided by the learned JC but for issue 2 and issue 3 discussed herein. Under issue 2 and issue 3, we found that the decision of the first respondent was predicated on unsupported evidence and/or law. As illustrated above, from the outset the decision-making process was tainted with the elements stated by the applicant in his O 53 r 3 statement, namely, illegality, irrationality and procedural impropriety.

[72] We found that the learned judge had relied on grounds proffered by the respondents in arriving at his decision to affirm the first respondent's decision without making his own analysis and evaluation of the facts surrounding the appeal and/or without appreciating the relevant law applicable to the factual matrix of this case.

[73] Having examined the appeal record and perused the written submissions and heard the oral arguments, we were constrained to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong on issue 2 and issue 3, and upon curial scrutiny merit our appellate intervention.

[74] Based on the facts that we had alluded herein, we were constrained to rule that issue 2 and issue 3 must be answered in favour of the applicant. We unanimously allow this appeal with costs. The decision of the High Court is hereby set aside. We grant the application for judicial review in terms of prayers (1), (4) and (5) as prayed for by the applicant with costs of RM20,000 subject to payment of allocatur. Deposit is refunded.

A **[75]** We therefore order accordingly.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor

B

C

D

E

F

G

H

I